

KAREN P. HEWITT
 United States Attorney
 NICOLE ACTON JONES
 Assistant U.S. Attorney
 California State Bar No. 231929
 Federal Office Building
 880 Front Street, Room 6293
 San Diego, California 92101-8893
 Telephone: (619) 557-5482
 nicole.jones@usdoj.gov

Attorneys for Plaintiff
 United States of America

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 07CR2609-JM
)	
Plaintiff,	)	DATE: May 30, 2008
	)	TIME: 11:00 a.m.
v.)	
	)	GOVERNMENT'S NOTICE OF MOTION
LEONARDO SAN JUAN, JR.,	)	AND MOTIONS <u>IN LIMINE</u> TO:
)	
Defendant.	)	(1) ADMIT STATEMENTS BY RAMIREZ;
	)	(2) ADMIT STATEMENTS BY
	)	DEFENDANT;
	)	(3) ALLOW VIDEO OF THE AK-47;
	)	(4) PRECLUDE INFLAMMATORY
	)	TESTIMONY;
	)	(5) PREAPPROVE VOIR DIRE
	)	QUESTIONS

PLEASE TAKE NOTICE that on May 30, 2008, at 11:00 a.m.,
 or as soon thereafter as counsel may be heard, the Plaintiff,
 the UNITED STATES OF AMERICA, by and through its counsel,
 KAREN P. HEWITT, United States Attorney, and NICOLE ACTON
 JONES and TARA MCGRATH, Assistant United States Attorneys,
 will ask this Court to issue an order granting the following
 Motions in Limine. These Motions are based upon the files and
 records of the case together with the attached Statement of
 Facts and Memorandum of Points and Authorities.

I

STATEMENT OF THE CASE

On November 29, 2007, a grand jury returned a one-count Indictment against Defendant Leonardo San Juan, Jr., charging him with possession of an unregistered firearm, in violation of 26 U.S.C. § 5861(d). On December 5, 2007, Defendant was arraigned on the Indictment and entered a plea of not guilty. On February 15, 2008, Defendant was arraigned on a one-count superseding Indictment and entered a plea of not guilty.

On May 16, 2008, this matter was scheduled for jury trial on June 2, 2008.

II

STATEMENT OF FACTS

On June 25, 2006, Captain Glenn Davis, United States Marine Corps Reserve, was working at the Iron Sights gun range when a then unidentified female came to the range to learn how to shoot her boyfriend's .45 caliber semi-automatic handgun for protection. Captain Davis attempted to teach her how to use the gun, but the female had difficulty with the weapon's slide and safety. Captain Davis asked the female if she had anything else, meaning another gun. The female responded that she had an M-4^{1/} and explained that she and her boyfriend had traveled out of state to get the gun and that after it was delivered, he wrapped it up and stuffed in the trunk. The female further explained that her boyfriend told her that if they were caught with the gun they would be in trouble. Captain Davis advised

^{1/} An M-4 is an assault rifle that can be semi-automatic or automatic, depending upon the model.

1 the female that she could not have that type of gun and should
2 not tell people about it. Captain Davis then asked if she had
3 anything else that would be easier to use, to which the female
4 responded that she had fifty (50) AK's in her garage. The
5 female stated that her boyfriend, who she had previously stated
6 was a Marine, had brought the guns back every time he returned
7 from Iraq. The female elaborated that he would sneak them back
8 in medical kit bags. Captain Davis told her that she needed to
9 get rid of the guns because she could go to jail. After the
10 female left, Captain Davis contacted law enforcement.

11 Agents with the Bureau of Alcohol, Tobacco, Firearms and
12 Explosives (ATF) and the Naval Criminal Investigative Service
13 (NCIS) conducted an investigation and, by tracing 911 calls,
14 identified the female as Christina Ramirez. On June 28, 2006,
15 ATF Agent Schmidt talked to Ramirez at her residence. Ramirez
16 stated she leased the residence with her fiancé, Leonardo San
17 Juan, Jr. (the Defendant). A consent search of the apartment
18 and its associated garage revealed an AK-47 machinegun in a
19 plastic container in the back of the garage, hidden beneath
20 military clothing and gear bearing Defendant San Juan's name.^{2/}

21 On or about June 29, 2006, Agent Schmidt received a
22 voicemail message from Defendant San Juan stating that he knew
23 guns were taken from his house and inquiring as to what was
24 going on. Agent Schmidt relayed the message to NCIS Agent
25 Tedla. On June 29, 2006, Agent Tedla spoke over the telephone
26

27 ^{2/} Agents also found a M-4 Bushmaster semi-automatic rifle
28 underneath Defendant's bed. This firearm, which is classified
under California law as an assault weapon, is the subject of a
pending case in San Diego Superior Court.

1 with Defendant San Juan, who stated that he knew his weapons
2 were taken the previous day from his house and he wanted to know
3 what was going on.

4 Testing of the weapon found in Defendant's garage by ATF
5 Firearms Enforcement Officer Michael Knapp revealed that the
6 firearm was a functional, fully-automatic AK-47. In addition,
7 Knapp determined that the machinegun had been manufactured at a
8 factory in Bulgaria and additional markings on the weapon
9 indicated it had been issued to the Iraqi National Forces.

10 A search of the National Firearms Registration and Transfer
11 Record revealed no registration records or authorizations
12 allowing Defendant to possess a fully automatic weapon.

13 On February 5, 2007, Agents Schmidt and Tedla went to San
14 Juan and Ramirez's apartment to serve a grand jury subpoena on
15 Ramirez. San Juan was home and he became confrontational with
16 the agents. Ramirez arrived while the agents were there and San
17 Juan instructed her "don't tell them anything, you don't have to
18 talk to them." Prior to testifying before the grand jury,
19 Ramirez formally asserted her 5th Amendment right against self-
20 incrimination and her privilege against adverse spousal
21 testimony.

22 III

23 GOVERNMENT'S MOTIONS IN LIMINE

24 **A. The Court Should Admit Statement by Ramirez**

25 As discussed above, the investigation that led to the
26 present charge against Defendant San Juan was initiated by
27 statements his then girlfriend (now wife) made to a private gun
28 shop employee. The Government seeks to admit Ramirez's

1 statements to Captain Davis as statements against penal
2 interest. Fed. R. Evid. 804(b)(3).

3 **1. Ramirez's Statements Were Not Testimonial**

4 As an initial matter, the Crawford Confrontation Clause
5 analysis does not apply to this situation because Ramirez's
6 statements were not testimonial. Crawford v. Washington, 541
7 U.S. 36, 68 (2004) (out of court statements that are testimonial
8 are barred unless the declarant is unavailable and the defendant
9 had a prior opportunity for cross-examination). As the Supreme
10 Court explained in a subsequent case: "It is the testimonial
11 character of the statement that separates it from other hearsay
12 that, while subject to traditional limitations upon hearsay
13 evidence, is not subject to the Confrontation Clause." Davis v.
14 Washington, 547 U.S. 813, 821 (2006) ("statements made to 911
15 operator describing a present emergency not testimonial.")

16 Although the Supreme Court did not define the term
17 "testimonial," in either Crawford or Davis the examples the
18 Court gave of testimonial hearsay are illustrative: 1) ex parte
19 in-court testimony, affidavits, custodial examinations, and
20 prior testimony; (2) "pretrial statements that declarants would
21 reasonably expect to be used prosecutorially;" (3) "formalized"
22 materials such as depositions and confessions; and (4)
23 "statements that were made under circumstances which would lead
24 an objective witness to reasonably believe that the statement
25 would be available for use at a later trial." Crawford, 541 U.S.
26 at 51-52. The Supreme Court also stated that "prior testimony at
27 a preliminary hearing, before a grand jury, or at a former
28

1 trial," as well as statements made during a police interrogation
2 are testimonial. Id. at 68.

3 Ramirez's statements do not fall into any of the categories
4 of statements discussed in Crawford or Davis. Ramirez's
5 statements are more analogous to co-conspirator statements,
6 which Court in Crawford expressly stated are non-testimonial.
7 Crawford, 541 U.S. at 56. Ramirez was not speaking to law
8 enforcement nor was she giving a formal statement. Under the
9 circumstances of this case, it is clear that Ramirez had no
10 reason to believe that the statements she was making to a local
11 gun shop employee would be used in a later prosecution. Cf.
12 Saechao v. Oregon, 249 Fed. Appx. 678, 679 (9th Cir. Oct. 2,
13 2007) (unpub.) (affirming admission of statements made by a co-
14 defendant to a friend in a tape-recorded jail call, stating that
15 Crawford "does not apply to 'an off-hand, overheard remark.'")
16 Because Ramirez's statements are non-testimonial, the
17 admissibility of the statements is subject to hearsay law, not
18 Crawford.

19 **2. Ramirez's Statements Were Against Her Penal Interest**

20 If Ramirez's statements are admitted for their truth, i.e.
21 that she had AK-47s in her garage, such statements would be
22 hearsay. The hearsay exception for statements against the
23 declarant's penal interest applies when the declarant is
24 unavailable as a witness and the statement, at the time of its
25 making, "so far tended to subject the declarant to civil or
26 criminal liability. . .that a reasonable person in the
27 declarant's position would not have made the statement unless
28 believing it to be true." Fed. R. Evid. 804(b)(3). In

1 addition, to satisfy the Confrontation Clause the statements
2 must carry "particularized guarantees of trustworthiness."
3 United States v. Boone, 229 F.3d 1231, 1233(9th Cir. 2000).

4 *a. Ramirez is unavailable*

5 A witness is unavailable if she is exempted from testifying
6 on the ground of privilege. Fed. R. Evid. 804(a)(1). In this
7 case, Ramirez invoked both her 5th Amendment and spousal
8 privileges to avoid testimony before the grand jury. The
9 Government will serve Ramirez with a trial subpoena, but
10 anticipates she will again invoke her rights. If she invokes,
11 she will be unavailable to testify as a witness regarding her
12 statements.

13 *b. Ramirez's statements were against penal interest*

14 Whether a statement was sufficiently against the declarant's
15 penal interest for purposes of Rule 804(b)(3) exception requires
16 a finding that "a reasonable person in the declarant's position
17 would not have made the statement unless believing it to be
18 true." To qualify under this exception, the statements must "in
19 a real and tangible way, subject [her] to criminal liability."
20 United States v. Hoyos, 573 F.2d 1111, 1115 (9th Cir.1978).
21 "Moreover, whether a statement is self-inculpatory or not can
22 only be determined by viewing it in context." Williamson v.
23 United States, 512 U.S. 594, 603 (1994).

24 During his testimony before the grand jury, Captain Davis
25 explained in detail the substance of Ramirez's statements and
26
27
28

1 the surrounding circumstances.^{3/} To begin, Ramirez voluntarily
2 disclosed to Captain Davis that she had access to an M-4, a
3 weapon which is illegal in California.^{4/} Specifically, after it
4 became clear that Ramirez was unable to shoot the .45 handgun,
5 Davis asked if she had access to another gun. Ramirez responded
6 "I have an M-4." Ramirez knew that possessing such a gun exposed
7 her to liability because she told Captain Davis that San Juan
8 had taken steps to hide the gun and that when she asked why, he
9 advised her they would "be in a lot of trouble" if they were
10 caught with the gun. Captain Davis responded to Ramirez's
11 admissions by telling her "You can't have these types of guns,
12 don't ever tell anybody that again."

13 After the discussion of the M-4, Captain Davis asked if
14 Ramirez "had anything else more simple to use," to which she
15 responded "Well, I have 50 AK's in my garage." Ramirez then
16 elaborated that her boyfriend, who she had previously stated was
17 an active duty Marine, brings them back from his tours in Iraq
18 by "sneak[ing] them in the medical kit bag, because they don't
19 check those." Ramirez further indicated that the weapons were
20 now wrapped up in their garage.

21 In context, it is clear that Ramirez knew that the AK-47s
22 were illegal based on San Juan's statements to her about how he
23 had obtained the weapons and the fact that they were hidden.

24 ^{3/} A copy of Davis's grand jury transcript will be
25 available at the hearing for the Court's review.

26 ^{4/} California Penal Code Section 12280(a) penalizes the
27 importation and the possession of an "assault weapon." The
28 Bushmaster M-4 was determined to be an "assault weapon" and this
weapon is currently the subject of a pending case against San
Juan in state court.

1 Moreover, in light of Captain Davis's previous reaction to her
2 admission about possessing an M-4, a reasonable person in
3 Ramirez's position would have understood that knowing possession
4 of Iraqi AK-47s would also expose her to criminal liability. In
5 addition, the fact that Ramirez invoked her 5th Amendment
6 privilege against self-incrimination to avoid testifying before
7 the grand jury further supports that her statements were against
8 her penal interest.

9 *c. The statements are trustworthy*

10 In Boone, an accomplice confided to his girlfriend that he
11 had committed a robbery with the defendant (Boone). 229 F.3d
12 at 1232. Unbeknownst to the accomplice, the girlfriend was
13 cooperating with law enforcement and had secretly taped their
14 conversation. Id. The Ninth Circuit affirmed the district
15 court's admission of the accomplice's statement in Boone's trial
16 as a statement against penal interest. Id. at 1234. The Court
17 found that the statements carried the necessary particularized
18 guarantee of trustworthiness because the statements were made in
19 a private setting, the accomplice inculpated himself as well as
20 Boone, and the accomplice was not trying to shift blame. Id.

21 Similarly, in Padilla v. Terhune, 309 F.3d 614 (9th Cir.
22 2002), an accomplice in a murder told a friend about what had
23 happened. Id. at 618. The Court affirmed the admission of the
24 accomplice's statement in a trial against a co-defendant. Id.
25 at 619. The Court found that the situation was like Boone
26 because the statement was made in a private setting, the
27 declarant had no reason to think the police were involved, and
28 the declarant did not attempt to mitigate his conduct or shift

1 blame. Id. Thus, the Court found that the statement's
2 admission did not violate the Confrontation Clause. Id. at 620.

3 Like the statements in Padilla and Boone, Ramirez's
4 statements carry a particularized guarantee of trustworthiness
5 given the attendant circumstances. Ramirez was not talking to
6 law enforcement, she made no effort to mitigate her involvement
7 (to the contrary, she openly claimed personal access and
8 knowledge of the weapons) nor was she attempting to implicate
9 San Juan in a crime. Rather, Ramirez was frightened about what
10 she thought had been an attempted break-in at her house and she
11 was seeking assistance from a gun shop employee on how to
12 protect herself. The statements were made in a private setting
13 and Ramirez's responses to Davis's questions were designed to
14 further her goal of learning to shoot a weapon. The statements
15 are also trustworthy because they were corroborated by the fact
16 that (1) ATF found an M-4 under her bed and, as she had stated,
17 the gun had come from out-of-state and (2) ATF found an AK-47
18 wrapped up in her garage and, as she had stated, the gun had
19 markings indicating it had come from Iraq. In this context,
20 Ramirez's statements satisfy the Confrontation Clause and are
21 admissible.

22 **3. The Government Agrees to Limit the Statements**

23 Although Ramirez's statements about the M-4, the number of
24 AK-47s and the fact that San Juan had smuggled the AK-47s into
25 the United States from Iraq in medical kit bags are relevant and
26 admissible, the Government is not seeking admission of Ramirez's
27 full statement to Captain Davis. The Government seeks to admit
28 Captain Davis's question to Ramirez regarding whether she has

1 access to any other guns and agrees to limit and sanitize her
2 response to be that she "has AKs in her garage." This statement
3 is highly relevant given Defendant San Juan's stated defense
4 that he did not know about the AK-47 that was found in the
5 garage he shared with Ramirez. The Government's limiting
6 proposal will eliminate any risk of *unfair* prejudice.
7 Accordingly, the statement should be admitted under Rule
8 804(b)(3).^{5/}

9 If the Court were to find that the statement is not
10 admissible under Rule 804(b)(3), the Government seeks to elicit
11 Ramirez's statement that she "has AKs in her garage" not for the
12 truth of the matter of asserted, but rather to establish the
13 circumstances leading to the search of her residence and the
14 seizure of the AK-47 charged in this case. Such evidence is
15 admissible under Ninth Circuit precedent. In United States v.
16 Daly, 974 F.2d 1215 (9th Cir. 1992), the defendant sought to
17 exclude the fact that the felon-in-possession charge arose out
18 of an eleven hour shoot-out with police. The Court rejected
19 this argument, holding that the jury "cannot be expected to make
20 its decision in a void." Id. at 1217. See also United States
21 v. Collins, 90 F.3d 1420, 1429 (9th Cir. 1996) (affirming
22 admission of evidence that the defendant was in the building to
23 commit a burglary in a felon-in-possession case).

24 _____
25 ^{5/} Defendant San Juan has indicated his defense is that he
26 allowed other individuals to use his garage and one of those
27 individuals put the gun in the garage without his knowledge.
28 If, however, Defendant San Juan argues that the gun belonged to
Ramirez and he was unaware of its existence, the remainder of
Ramirez's statement regarding how the AK-47s came to be in her
garage should be admitted.

1 Without Ramirez's statement, the Government will be unable
2 to explain why ATF knocked on her door on June 28, 2006 and the
3 resulting hole in the story could mislead the jury. This is the
4 same issue presented in the above-cited felon-in-possession
5 cases where the Government was allowed to introduce the
6 circumstances surrounding how the defendant came to be found
7 with the charged gun in the first place. In this case the issue
8 is amplified by the fact that San Juan will be in full uniform
9 throughout the course of the trial - the jury needs to know that
10 San Juan was not being unfairly targeted and that ATF was not
11 simply knocking on random doors. Accordingly, if Ramirez's
12 statement is not admitted for its truth, the statement should be
13 admitted (with a limiting instruction) to establish why Captain
14 Davis contacted law enforcement and why Agent Schmidt began an
15 investigation.

16 **B. The Court Should Admit Statements by Defendant San Juan**

17 Defendant San Juan has indicated that his defense to the
18 charge is that he did not know the AK-47 was in the garage and
19 that someone else must have put it there. In light of this
20 defense, and the fact that the Government must prove that
21 Defendant San Juan knowingly possessed the AK-47, the Government
22 seeks to elicit certain statements made by Defendant San Juan
23 that go to his knowledge of the weapon. Such statements are not
24 hearsay because the statements were made by a party-opponent.
25 Fed. R. Evid. 801(d)(2).

1 Specifically, the Government seeks to admit the following
2 statements:^{6/}

3 1) the substance of the voicemail message Defendant San Juan
4 left for Agent Schmidt on June 29, 2008 regarding the weapons
5 taken from his residence during the consent search;

6 2) the substance of Defendant San Juan's conversation with
7 Agent Tedla on June 29, 2008 regarding the weapons taken from
8 his residence during the consent search;

9 3) the substance of Defendant San Juan's telephone
10 conversation during the summer of 2006 with Staff Sergeant
11 Robert Wold wherein he admitted that he had brought an AK-47
12 back from Iraq and that ATF had found it;

13 4) Defendant San Juan's instructions to Ramirez on February
14 5, 2007 "don't tell them anything, you don't have to talk to
15 them", when Agents Schmidt and Tedla were attempting to serve
16 the grand jury subpoena on Ramirez.

17 The first two statements are relevant because San Juan
18 refers to the seized weapons as belonging to him, which goes to
19 his knowledge that the AK-47 was in his garage. Although these
20 statements were made to law enforcement, Defendant San Juan
21 clearly was not in custody at the time the statements were made
22 nor were the statements made in response to interrogation.
23 Moreover, there is no question but that the statements were
24 voluntary in that the statements were initiated by Defendant San
25 Juan himself. Accordingly, the statements are admissible.

26
27
28 ^{6/} The list of specific statements is not intended to be
exclusive and the Government reserves the right to admit
additional statements if such statements become relevant.

1 The third statement is highly relevant because Defendant San
2 Juan admitted to bringing the AK-47 back from Iraq. Staff
3 Sergeant Wold is not a member of law enforcement, rather he is
4 an active duty Marine who served with Defendant San Juan in
5 Iraq. Defendant San Juan initiated the call and Staff Sergeant
6 Wold will testify at trial and will therefore be subject to
7 cross-examination. Accordingly, Defendant San Juan's statement
8 to Staff Sergeant Wold is admissible.

9 The fourth statement is relevant as consciousness of guilt,
10 particularly in light of the fact that it was Ramirez's
11 statements to Captain Davis that prompted the consent search and
12 the grand jury subpoena in the first place. Again, San Juan's
13 statement was voluntary and he was not in custody nor was he
14 responding to interrogation. Accordingly, San Juan's statement
15 to Ramirez is admissible. To the extent the Court finds that
16 the context of the statement (service of a grand jury subpoena
17 on Ramirez) is somehow unfairly prejudicial given that Ramirez
18 will likely invoke her 5th Amendment and spousal privileges, the
19 statement can be sanitized to remove the reference to the
20 subpoena.

21 **C. The Court Should Allow Video of the Machinegun**

22 The Government seeks to introduce a video of an ATF agent
23 firing the AK-47 charged in this case. The video will be
24 produced in discovery in advance of the hearing date. The video
25 is relevant for two purposes. First, the Government must prove
26 that the AK-47 is fully automatic. The video is the best
27 evidence of the weapon's fully automatic capability. Second,
28 the Government must prove that Defendant San Juan *knew* that the

1 AK-47 was fully automatic. The video is required to show the
2 jury that a person, like San Juan, who has experience with Iraqi
3 AK-47s and has seen them in use, would know that such a weapon
4 is fully automatic. This is especially important because this
5 AK-47 (which was manufactured in 1969) looks like a regular
6 rifle and does not resemble the type of machineguns the jurors
7 may have seen on television. Accordingly, the Government should
8 be allowed to show a brief video of the AK-47 being fired.

9 **D. The Court Should Preclude Inflammatory Testimony**

10 The Government has spoken with several potential defense
11 witnesses. Many of these witnesses have made comments to the
12 effect that prosecuting Defendant San Juan will harm the
13 Marines, the United States, and/or the war effort in Iraq. The
14 Government wants to flag this issue because such testimony has
15 no relevance and would unfairly prejudicial. Accordingly, such
16 inflammatory testimony is inadmissible. Fed. R. Evid. 402, 403.

17 **E. The Court Should Approve Attorney Conducted *Voir Dire***

18 The Government will include a list of proposed *voir dire*
19 questions in its trial memorandum, which will be filed in
20 advance of the in limine hearing. Because this case involves
21 sensitive issues, especially in light of the fact that the
22 defendant will be wearing a Marine uniform, the Government
23 requests that the Court approve both defense and Government *voir*
24 *dire* questions in advance. Such advance screening will avoid
25 the jury being tainted by questions that are deemed improper
26 only after they have been asked.

27 //

28 //

IV

GOVERNMENT'S RENEWED MOTION FOR RECIPROCAL DISCOVERY

To date, the Defendant has produced a list of potential witnesses, but he has not produced reciprocal discovery in the form of documents, exhibits or prior statements. The Government requests that the Defendant comply with Rules 12.2 and 16(b) of the Federal Rules of Criminal Procedure, as well as Rule 26.2 which requires the production of prior statements of all witnesses, except for those of the Defendant. The Defendant has not provided the Government with any documents, photographs, or statements. Accordingly, the Government intends to object at trial and ask this Court to suppress any evidence at trial which has not been provided to the Government.

V

CONCLUSION

For the above stated reasons, the Government respectfully requests that its Motions in Limine and Renewed Motion for Reciprocal Discovery be granted.

DATED: May 23, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

S/Nicole Acton Jones
NICOLE ACTON JONES
TARA MCGRATH
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 07cr3239-JM
)
Plaintiff,)
)
v.)
) CERTIFICATE OF SERVICE
LEONARDO SAN JUAN, JR.)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, Nicole A. Jones, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Motions in Limine and Renewed Motion for Reciprocal Discovery on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1) Joseph H. Low IV

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

none

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 23, 2008.

s/Nicole Acton Jones
NICOLE ACTON JONES
E-mail: nicole.jones@usdoj.gov